thereof. I agree with his assertion but wish to add that, although section 51 of the Criminal Procedure Code does not place the obligation on the police as in section 76 of the Evidence Act to supply certified copies of the document sought for, the section clearly did not prohibit the applicant from making copies of them himself.

There shall be order in terms of the application in respect of the statements, cautioned or uncautioned, made by the applicant and the documents seized by the B.S.N.

The application for statements of co-accused is refused. However, he may, by a similar application, obtain them for his own defence.

In conclusion I wish to express that a remarkably higher standard of justice would have been achieved if the parties adopt a more liberal approach towards applications of this kind. Documents produced unexpectedly in court can only result in adjournment and delay in the disposal of a case. An attitude of undue caution in the production of documents necessary for the defence of an accused person may unfairly give rise to the insinuation that the prosecution is resorting to a hide and seek method or reducing the defence into a game of blind man's buff.

Order accordingly.

Solicitors: *Joseph & Son.*

SEKONG RUBBER CO. LTD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Salleh Abas F.J.) November 3, 1979]

[Kuala Lumpur — Tax Appeal No. 1 of 1979]

Revenue Law — Sale of timber growing on estate belonging to company — Company having powers to carry on business of rubber planters and timber merchants and dealers — Whether income received from sale income in respect of gains or profits from a business — Whether capital or revenue receipts — Income Tax Act, 1967.

In this case the appellants were a company which had powers under their memorandum and articles of association to carry on, among other things, the business of rubber planters as well as that of timber merchants and dealers. They acquired land for the propose of planting rubber but after planting a small portion of the land with rubber, in 1930 they ceased to be rubber planters and the estate was closed down, so that the planted areas reverted to jungle land. In 1971 the company entered into an agreement with another company whereby the trees on a specified area of the land were sold for $420,000. The purchasers were given rights to fell and remove the timber from the said area and it was stated that the logging operations should be completed on or before July 31, 1974. The appellants were assessed to income tax on the sum of $420,000 and on appeal the Special Commissioners confirmed the assessment, holding that the sale of the timber was an adventure in the nature of trade. The appellants appealed.

Held: (1) the principle is that in the case of a company incorporated for the purpose of making profits for its shareholders, any gainful use to which it puts any of its assets *prima facie* amounts to a carrying on of a business;

(2) in this case having regard to the appellant's memorandum and articles of association and to what they did from the moment they acquired the estate to the time when they sold the standing timber on their estate, their activities could be said to be leading to the maturing of the asset and the sale must be an adventure in the nature of trade and once the transaction has the badge of trade, the fact that it is an isolated transaction does not prevent the transaction from being in truth an adventure in the nature of trade;

(3) since only the timber was sold and not the land, and as the sale was such that the timber had to be cut immediately, the finding of the Special Commissioners was therefore correct. The timber sold were not capital assets and the receipts were not capital receipts but revenue receipts subject to tax.

Cases referred to:-

(1) *American Leaf Blending Sendirian Berhad* v. *Director General of Inland Revenue* [1979] 1 M.L.J. 1; [1978] 3 All E.R. 1185.

(2) *International Investment Limited* v. *Comptroller-General of Inland Revenue* [1979] 1 M.L.J. 4.

(3) *J.P. Harrison (Watford) Limited* v. *Griffiths* (1962) 40 T.C. 281, 303.

(4) *Edwards* v. *Bairstow* (1955) 36 T.C. 207, 230.

(5) *St. Aubyn Estate Ltd.* v. *Strick* (1932) 17 T.C. 412.

(6) *Kauri Timber Company Limited* v. *Commissioner of Taxes* [1913] A.C. 771.

(7) *Hood Barrs* v. *Commissioners of Inland Revenue* (1955) 37 T.C. 188.

(8) *Murray* v. *Commissioners of Inland Revenue* (1951) 32 T.C. 238.

(9) *Hopwood* v. *Spencer* (1964) 42 T.C. 169.

(10) *Thomson* v. *Deputy Federal Commissioner of Taxation* (1929) 43 C.L.R. 360.

(11) *Hudson's Bay Company Limited* v. *Stevens* (1909) 5 T.C. 424.

(12) *Taylor* v. *Good* (1973) 49 T.C. 277.

(13) *Commissioners of Inland Revenue* v. *Pilcher* (1949) 31 T.C. 314, 335-336.

TAX APPEAL.

J.J. Puthucheary for the appellants.

Jaafar bin Mat Saman (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J.: The question to be determined in this case is whether the sum of $420,000 received by the appellants from the sale of the timber growing on their estate is "income in respect of gains or profits from a business" within the meaning of the Income Tax Act (Revised 1971). The answer to this question in turn depends upon whether the transaction by which the appellants sold the timber and thus received the said sum is a business transaction or one which can be regarded as any part of an adventure in the nature of trade. The Special Commissioners found that the transaction is an adventure in the nature of trade and so confirmed the assessment.

The appellants are a company incorporated in 1908 under the U.K. Company Legislation, i.e. the Companies Acts 1862 to 1900. They have powers under their Memorandum and Articles of Association to carry on, among other things, the business of rubber planters as well as that of timber merchants and dealers. They acquired the property, i.e. the estate, only two months after their incorporation undoubtedly for the purpose of planting rubber; but after planting a small portion of the estate with rubber, in 1930 they ceased to be rubber planters and the estate was closed down and so the planted areas reverted to jungle land. No reason was proffered by the appellants as to why they ceased planting rubber on the estate. However, the Special Commissioners attributed the cessation to the fact that having regard to the low price of rubber

during the period of economic depression in the 1930s, it was no longer profitable for the appellants to carry on rubber planting and make rubber planting a worthwhile business venture. In my judgment, I do not consider very important the reason why the appellants ceased to be rubber growers. The plain fact is that since the closure of the estate in 1930 no attempt has been made by them to revive that business. Yet, despite the cessation of this business, the appellants were not wound up. They continued to retain ownership of the land for which in 1951, upon the same land being surrendered to the government for the purpose of subdivision, a new document of title was issued. Again, there was no evidence given as to the reason why subdivision was needed. The Special Commissioners found that having regard to the appellants' objects enabling them to carry on the business of timber merchants and dealers coupled with the subsequent sale of timber in 1971, the subdivision was done for no other purpose than that of carrying on the business of timber merchants. The Special Commissioners said that had it been the intention of the appellants to wind-up their business or to dispose of their assets, they would not have subdivided the land. Thus they held that the sale of timber was therefore a transaction partaking of the adventure in the nature of trade.

The case seems to be on all fours with the *American Leaf Blending Sendirian Berhad* v. *Director-General of Inland Revenue*[1] where Lord Diplock, giving judgments of their Lordships of the Privy Council, recognizing the distinction between an individual and a company, said that "in the case of a company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets, *prima facie*, amounts to the carrying on of a business" and that, in practice, where the company is following their own objects contained in the Memorandum of Association, this *prima facie* inference is not easily displaced. This principle was repeated by Lord Fraser of Tullybelton in *International Investment Limited* v. *Comptroller-General of Inland Revenue.*[2] Similar language was uttered by Lord Guest in *J.P. Harrison (Watford) Limited* v. *Griffiths*[3] as follows: —

"... But where the company has power under its Memorandum of Association to indulge in a particular activity and the transaction contains otherwise all the indicia of trading in that line of business, the fact that it was an isolated transaction is, in my opinion, *nihil ad rem*." (Page 303).

It is true that in the present appeal before me the sale of timber was an isolated transaction; but having regard to the nature of the property sold and the powers of the appellants to indulge in timber business, this fact of single transaction makes no difference at all and does not render the transaction less than an adventure in the nature of trade (see Lord Radcliffe in *Edwards* v. *Bairstow*[4]). Further, it is of no consequence to the result of the appellants' business if instead of selling the growing timber, the appellants themselves had cut the timber and sold it in the form of logs, or even sawn timber or any other products derived from the timber. Of course it is neater for the appellants to sell the standing timber, as they did, rather than to sell it in the form of logs or other timber products. The manner in which the appellants are carrying on their business is not material for tax purposes. What is important is the result of their business. This is stated by Lord Guest in *J.P. Harrison (Watford) Ltd.* v. *Griffiths, supra,* in the following language: —

"An individual or a company can conduct their business in the most extravagant way: they can conduct it with the certainty of making a loss. But the revenue is not concerned with the particular method of trading, they are only concerned with the results of the business. If there are profits or gains and the business is trade, then income tax is payable. If there are losses, relief is available under section 341." (Page 303).

Thus, whether a transaction is an adventure in the nature of trade or not must depend in the final analysis upon the facts of each particular case; the guiding principles in the case of a company being —

(1) the Memorandum and Articles of the company;

(2) what it did at its inception;

(3) what it did subsequently until the property was disposed of; and

(4) the circumstances material to the case.

(*St. Aubyn Estate Ltd.* v. *Strick*[5] *per* Finlay J. at page 419). Being so guided, I am therefore satisfied that what the appellants did in this case in selling the growing timber for which they received a sum of $420,000 is part of an adventure in the nature of trade. No criticism can therefore be made on the finding of the Special Commissioners on this point.

My attention has been drawn to a number of cases dealing with the sale of standing timber between vendor and purchaser, both being timber merchants. The principles that can be deduced from them are as follows. Where under a sale agreement a timber merchant purchasing standing timber obtains rights to cut, fell and remove the timber at any time at his option, or to select any particular timber for cutting and removing, the rights so obtained being so enduring are, to use the language of Lord Shaw of Dunfermline in *Kauri Timber Company Ltd.* v. *Commissioner of Taxes,*[6] "an interest in and possession of land", and therefore capital assets and not stock-in-trade. This principle is also accepted by the House of Lords in *Hood Barrs* v. *Commissioners of Inland Revenue.*[7] On the other hand, where the purchaser obtains rights to cut, fell and remove the trees immediately or within a specified time limit, the rights so obtained is a proprietary right in the timber only and therefore the purchaser obtains his stock-in-trade and the outlay for the purchase is a revenue expenditure: *Murray* v. *Commissioners of Inland Revenue*[8] and *Hopwood* v. *Spencer.*[9] But where the vendor is *not a timber merchant,* the sale of standing timber, though to a timber merchant, and even though the timber has to be cut, felled and removed immediately or within a specified time limit, does not amount to a sale of the vendor's stock-in-trade, but a disposal of his capital asset, the reason being that since *the seller is not a timber merchant,* such sale is not an adventure in the nature of trade. *Thomson* v. *Deputy Federal Commissioner of Taxation.*[10]

The appellants contended that their sale agreement 1971 was a disposal of an "interest in and pos-

session of land", i.e. their capital assets, and as such the proceeds of the sale are capital receipts not subject to income tax. To deal with this submission, it is therefore necessary to examine the 1971 agreement itself by which the appellants sold their timber for $420,000 to Lian Hing Construction and Engineering Sendirian Berhad. The Special Commissioners held that it is a "sale of timber which was immediately severable and constituted an adventure in the nature of trade". Looking at the agreement itself, I am of the view that the Special Commissioners' finding and conclusion are justified. What were sold were timber-bearing trees standing within the specified area of the estate. The quantity of timber which these trees could produce was estimated to be about one million cubic feet, and it was sold for a sum of $420,000. The purchasers were given rights "to fell and remove timber from the said area". Logging operations had already begun even before the agreement was signed and according to the recital in the agreement, "shall be completed on or before July 31, 1974". What the appellants sold was therefore not an "interest in and possession of land", but the very proprietary rights in the timber itself. Only the ownership in the timber was dealt with in the agreement and nothing else. This case in my judgment falls to be governed by the principle enunciated in *Murray* v. *Commissioners of Inland Revenue, supra,* and *Hopwood* v. *Spencer, supra,* as it is clear that the standing timber sold by the appellants had to be extracted immediately; logging operations having been already carried out at the time of the agreement and had to be completed within a period of four years. Such sale simply means the sale of proprietary rights in timber and not the interest in the land. That being the case, the submission must fail and the Commissioners' finding and conclusion on the subject is justified and should be upheld.

The case which on the surface appears to be in favour of the appellants is *Thomson* v. *Deputy Federal Commissioner of Taxation.*[10] In this case the taxpayer in 1903 took a lease of 1,000 acres of land for grazing purposes. In 1925 the land ceased to be used for grazing as it had been eaten by overstocking. The taxpayer by an agreement sold for a sum of £1,800 to a timber company the growing timber of certain size and height and the company was to cut, fell and take away the timber within five years. The High Court of Australia held that the sale of the standing timber was a mere conversion into money of part of the taxpayers' capital and therefore was not income. This case appears to be in direct conflict with the Privy Council's decision in *Kauri Timber Company's* case and the House of Lords' decision in *Hood Barrs'* case, in so far as the transaction was held to be a disposal of capital assets despite the fact that unlike the facts in *Kauri Timber Company's* case and *Hood Barrs'* case, the subject-matter of sale was standing timber of definite identification which had to be completely logged within a specified time, namely within five years and not so enduring a right as to amount to an "interest in and possession of land". The case is also in direct conflict with *Hopwood's* case and *Murray's* case, in that although the subject-matter sold is the same, yet the transaction was not held to be the transaction relating to stock-in-trade. *Thomson's* case therefore stands on its own footing and under its own peculiar circumstances. The transaction was not an adventure in the nature of trade because the taxpayer, unlike the cases cited above, *was not a timber merchant,* but a cattle grazer and the land was acquired not for the purpose of growing or cutting timber but for grazing cattle. Furthermore, the proceeds of the sale were even treated by the Crown to be income from property. In its judgment the High Court of Australia set out clearly its *ratio decidendi* as follows:—

> "She (the taxpayer) had taken up this land as far back at 1903. *Neither she nor her husband took up the land with a view to growing or selling timber,* and at first they had used it for grazing. It had however been eaten out by overstocking. There is therefore *no question in this case of a business, trade, pursuit* or avocation; and this the Commissioner in effect admits by treating the sum in question *as income from property.* Upon these facts we see no reason why the proceeds of the sale of the timber should be considered as income. The timber formed part of the asset which the appellant acquired when she took up the land." (Page 363).

In view of the above *ratio decidendi,* I cannot see how the case of *Thomson* v. *Deputy Federal Commissioner of Taxation* is applicable to the present appeal.

Thus, the crux of the matter is whether the appellants in this appeal had indulged in an adventure in the nature of trade or not. Only when they had so indulged would the principle established in *Kauri Timber Company Limited's* case and *Hood Barrs'* case on the one hand, and that decided in *Murray's* case and *Hopwood's* case on the other, become relevant. Otherwise, they are not applicable. In all these four cases, the question whether the sale of standing timber was an adventure in the nature of trade was not in dispute, whereas in the present appeal the Special Commissioners found that the transaction was an adventure in the nature of trade.

Counsel for the appellants next submitted that the transaction was not trade nor an adventure in the nature of trade because the estate of which the growing timber was part was acquired by the appellants in 1903 without any intention to re-sell it, and in selling the standing timber the appellants were only disposing of their capital assets. Reliance is placed on the *Hudson's Bay Company Limited* v. *Stevens*[11] and *Taylor* v. *Good.*[12] The short answer to this submission is that the appellants did not sell the estate at all. What they sold was the growing timber in the estate which had to be cut down within a period of not more than four years. In fact the position of the appellants is similar to that of the vendor of a cherry orchard in *Commissioners of Inland Revenue* v. *Pilcher.*[13] In that case, Jenkins L.J. expressed the view that had the vendor of the cherry orchard from whom Mr. Pilcher the taxpayer purchased it, sold the orchard and the year's crop *separately,* the proceeds of the fruit cherries so sold would be an income receipt chargeable to tax. On the other hand, by selling the fruits *together* with the land, as he did in that case, the vendor was disposing of his capital assets, and the proceeds received did not attract income tax. It is obvious therefore that in the present appeal the appellants were not selling the estate, i.e. the land, but only the timber standing on the estate.

The proceeds of such sale in my view would be nothing but income from capital which attracts income tax because the rights given to the purchaser and the consequences or incidents of their ownership of the estate which they still retain.

The *Hudson's Bay Company's* case and the case of *Taylor* v. *Good* establish a principle that where a taxpayer owns or buys a property without intention to re-sell it, subsequent sale of the property does not constitute an adventure in the nature of trade but a mere disposal of his capital. Thus, it was held that the *Hudson's Bay Company* was not engaged in buying and selling land when it sold lands which it acquired from the Canadian Government in exchange of surrendering its rights of government and some other lands belonging to it. Further, in *Taylor* v. *Good* it was held that the taxpayer who was a business retailer was also not engaged in buying and selling land when he sold a house together with its compounds which he earlier acquired for the purpose of residing therein. Since the property sold was not acquired for the purpose of re-selling, the subsequent sale would not make the sale an adventure in the nature of trade. In the present appeal, I do not think that the acquisition of the estate by the appellants could be regarded as otherwise than an acquisition for the purpose of adventure in the nature of trade. It is accepted by the appellants themselves in the agreed statement of facts that they are rubber growers and timber merchants and dealers. The acquisition of the estate as well as dealing with the estate including the sale of the standing timber in 1971 are, in my view, nonetheless an adventure in the nature of trade. What they were doing were completely authorised by their Memorandum and Articles of Association. Furthermore, unlike the *Hudson's Bay Company's* case, the appellants are a statutory company which are different from an individual and a chartered company; the position of the latter being assimilated to that of an individual (*Hudson's Bay Company's* case: page 435). In *Taylor* v. *Good*, the taxpayer was an individual whose business was not dealing in land at all and the Crown accepted that the acquisition of the property which was sold subsequently was not an adventure in the nature of trade. In the present appeal, however, the Special Commissioners did not find that the estate was not acquired for purposes other than trade or adventure in the nature of trade. Therefore, in my view, neither the case of *Hudson's Bay Company* nor the case of *Taylor* v. *Good* are applicable to the present appeal. The Special Commissioners said: —

"...It is also true that on the evidence it was so far an isolated transaction as regards the sale of timber. But in view of the material facts relating to the nature of the land, its retention as a source of timber, the permanent closing down of the rubber planting business, the subdivision of the land, the carrying out of two of the business objects in the Memorandum of Association by a *trading company*, the previous logging by the purchaser under the agreement, the maturity of the trees, the rather short three year period and last but not least the previous business of rubber planting, all these taken together point unswervingly to the first 'plunge in the waters of trade' namely an adventure in the nature of trade in so far as the timber trade is concerned. *See International Investment Ltd.* v. *C.G.I.R.*[2] as to the general principle. On the evidence before us it is not unlikely for future plunges to be taken in view of the fact that the lease is for 999 years. Indeed if we were to take into account the first business of rubber planting it is the second plunge and the *American Leaf Blending* Case shows that business is business no matter a change from one to the other."

It seems to me that the approach taken by the Special Commissioners in coming to their conclusion was fully justified in law, viz.: one has to look at firstly the Memorandum and Articles of the Company, secondly what the company did at its inception and subsequently, and finally at all other circumstances. (See Finlay J. in *St. Aubyn Estate Limited* v. *Strick*[5] at page 419). Having regard to the appellants' memorandum and articles, and to what they did from the moment they acquired the estate to the time when they sold the standing timber on the estate, their activities, to use the words of Viscount Simonds (in *Edwards* v. *Bairstow*[4] at page 225) can be said to be leading "to the maturing of the asset" and the sale must be an adventure in the nature of trade, and once the transaction has the badge of trade, the fact that it is an isolated case does not prevent the transaction from being in truth an adventure in the nature of trade (see Lord Radcliffe in the same case at page 230).

Consequently, there can be no other apt description which could be given to the sale transaction by the appellants of the standing timber in 1971 than that they were engaged in commercial transaction or in an adventure in the nature of trade. Since only the timber was sold and not the land, and as the sale was such that the timber had to be cut immediately, the finding and the conclusion of the Special Commissioners are therefore correct. The timber sold are not capital assets and the receipts are not capital receipts but revenue receipts subject to income tax.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*

MOHAMED BIN ABDULLAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Harun J.) October 12, 1979]

[Kuala Lumpur Criminal Appeal No. 45 of 1979]

Criminal Law and Procedure — Summary trial — Absence of counsel — No miscarriage of justice — Federal Constitution, Art. 5(3).

Constitutional Law — Right to counsel — Summary trial in absence of counsel — No miscarriage of justice — Federal Constitution, Art. 5(3).

In this case the appellant had been charged with criminal breach of trust under section 409 of the Penal Code. At the date of hearing of the case, counsel for the accused was not present as it appeared that he had urgent business in Johore Bahru relating to a land matter. The learned President of the Sessions Court proceeded with the hearing in the absence of counsel. After the appellant had been called for his defence, a second counsel appeared and after consulting his client, informed the court that he had advised him to remain silent. The appellant was convicted and sentenced to 18 months' imprisonment. The appellant appealed. The main grounds of appeal were that the learned President erred in proceeding to hear and determine the case without the presence of defence counsel and in making the accused conduct his own defence.

Held: (1) on the facts of this case there had been no mis-